NO. 84379-1
~~84746-1~~

SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the

GUARDIANSHIP OF MARY JANE McNAMARA.

ANSWER TO STATEMENT OF GROUNDS FOR DIRECT REVIEW

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Respondent Department of Social Health Services (DSHS) submits this answer in opposition to Appellants' Statement of Grounds for Direct Review.

I. NATURE OF THE CASE AND DECISION

This case involves a request by court-appointed guardians for compensation under RCW 11.92.180. In reviewing the guardians' intermediate accounting in each of these six consolidated cases, the superior court commissioner determined that certain of the guardians' activities had provided no benefit to any of the individual wards. Accordingly, the request for compensation was denied in part.

Suzanne MacKenzie, Richard Milton, Mary Jane McNamara, Kirby Moser, David Schmidt, and Daniel Werlinger are legally incapacitated adults.[1] All six are Medicaid recipients and residents of Fircrest School, a state-run institution for the developmentally disabled. As a condition of their receipt of Medicaid services at Fircrest, they are required to contribute most of their monthly Social Security income toward their costs of care, except for income that is diverted to a deductable expense. One of the allowed deductions is for guardian fees,

[1] No citation is possible because the clerk's papers have not yet been designated in this matter. The factual assertions in this Answer are generally supported by the materials filed by the parties, and by the superior court's unchallenged findings.

limited to $175 per month except under extraordinary circumstances. WAC 388-513-1380(4); WAC 388-79-030, -050.

Appellant James Hardman is a certified professional guardian who works primarily with persons with developmental disabilities.[2] Mr. Hardman has been appointed as guardian of the person and estate in each of these six consolidated cases. His mother, appellant Alice Hardman, is also a certified professional guardian. Ms. Hardman has been appointed co-guardian for Ms. MacKenzie, Mr. Milton, and Mr. Werlinger. As guardians, the Hardmans provide the kinds of financial, medical, and personal decision-making that guardians have a duty to provide under RCW 11.92.040 and .043. Additionally, the Hardmans spend some of their time engaged in "advocacy" including political activism and lobbying, which they have argued is necessary to prevent changes or closure at Fircrest and similar institutions.

In October 2009, the Hardmans filed interim guardianship reports in all six cases. They requested court approval for $65,171.67 in fees for the previous three years—$175 per month from Ms. McNamara, and $325 per month from each of the others. They also requested the authority to collect an allowance of $400.00 per month from the income of each ward for the subsequent three-year period. Those requests were

[2] Mr. Hardman serves as guardian or co-guardian for 32 residents of state institutions for the developmentally disabled, including 26 residents at Fircrest School.

supported by timesheets detailing the normal guardianship activities in each case—such as meetings with doctors and caregivers—plus a report, identical in all six cases, describing their advocacy activities generally.

DSHS objected to the Hardmans' fee requests for advocacy as exceeding the limits set by WAC 388-79-030, as being outside the scope of their duties as guardians, and as failing to serve or benefit the individual needs of each ward. The superior court commissioner agreed. In a memorandum decision dated December 18, 2009, the commissioner determined that the Hardmans' general advocacy on behalf of the disabled community as a whole could not justify charging fees to each of their wards individually; and that there was no direct connection between the Hardmans' advocacy activities and any benefit to Ms. McNamara or the other wards. (Appendix B to Grounds for Direct Review, at 8.) For instance, the Hardmans justified their advocacy fees in part based on their unsuccessful efforts to prevent the closure of a cafeteria at Fircrest—but there was no evidence that Ms. McNamara or the other wards used or benefitted from the cafeteria, and some of the wards are non-ambulatory and tube-fed. The commissioner ruled that the Hardmans could collect $175 per month in fees for performing customary guardian duties.

Days later, on December 21, 2009, the Court of Appeals announced its decision in *In re Guardianship of Lamb*, 154 Wn. App. 536, 228 P.3d 32 (2009) (attached as Appendix A).[3] *Lamb*, which also involved the Hardmans and their fees for political advocacy at Fircrest, determined that the Hardmans could not collect such fees in part because there was no showing that their advocacy would "directly benefit" the individual ward. *Lamb*, 154 Wn. App. at 546.

After the commissioner's memorandum decision was entered as an order in this case, the Hardmans sought reconsideration and attempted to submit additional, previously-available evidence based on an argument that the *Lamb* decision constituted surprise. Reconsideration was denied, and the untimely evidence stricken. A superior court judge denied the Hardmans' motion for revision, affirming the commissioner in all respects. (Appendix A to Grounds for Direct Review, at 1.)

II. COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW

In their Statement of Grounds for Direct Review, the Hardmans list four issues. Issues 1 and 2 are not at issue in this case, and Issues 3 and 4 are ill-defined constitutional claims. The Hardmans also identify

[3] *Lamb* was initially unpublished; it was ordered published on February 17, 2010.

two "associated issues" they seek to preserve, and they seek to "reserve the right" to identify still more issues later. Under RAP 4.2(b)(2), a statement of grounds must provide "[a] statement of each issue the party intends to present for review". The Hardmans' failure to appropriately do so leaves the Respondent to guess at the intended scope of their appeal. To the extent possible, we attempt to restate their issues:

1. Under RCW 11.92.180, a court-appointed guardian of an incapacitated adult "shall be allowed such compensation for his or her services as guardian . . . as the [superior] court shall deem just and reasonable." Is the superior court required to authorize guardian compensation from the ward's assets for time the guardian spends on activities that the court determines to be unnecessary, unbeneficial, and not undertaken on behalf of the individual ward?

2. Under RCW 11.96A.150, must a superior court award attorney fees from a third party to a court-appointed guardian who unsuccessfully argues for additional compensation from his ward's assets?

3. Do Article I, section 4 of the Washington Constitution or the First Amendment or Fourteenth Amendment to the United States Constitution require that an individual activist, who engages in speech or political advocacy regarding issues of interest to the disabled, be compensated from the estate of an individual disabled person, where the

activist is that person's court-appointed guardian, even where the advocacy is not provided specifically for that disabled person, and has no direct connection to the disabled person's actual needs?

4. Do RCW 11.92.180 and RCW 43.20B.460, which place limits upon the amount of compensation which can be allowed out of the estates of certain Medicaid recipients, violate the constitutional principle of separation of powers?

5. Under Civil Rule 59, is a party entitled to submit additional, previously-available evidence to support a motion for reconsideration, when the asserted ground for reconsideration is surprise based on the non-moving party's legal theory being affirmed in a newly-issued appellate decision involving the same parties?

III. REASONS WHY THE COURT SHOULD DENY DIRECT REVIEW

A party may seek direct Supreme Court review of a superior court decision only as provided in RAP 4.2(a). The Hardmans argue that this case presents a public issue such that RAP 4.2(a)(4) applies.[4] Under RAP 4.2(a)(4), direct review is available only if the case involves "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." Appellant cannot meet that standard

[4] The other considerations listed by the Hardmans—judicial economy, costs to the parties, and the delay of the appeal process—appear nowhere in RAP 4.2.

in this case; the case should be sent to the Court of Appeals for appellate review in the normal course.

A. The Hardmans Misstate The Issues Presented By This Case

The Hardmans' issues #1 and #2 are taken verbatim from their petition for review in *In re Guardianship of Lamb*, No. 84379-1 (attached as Appendix B). Their grounds for direct review lean largely on the grant of review of the Court of Appeals decision in that case. This case does not raise either of the narrow issues presently under review in *Lamb*.

The Hardmans' "Issue 1," whether a guardian can collect compensation where he fails to show that his services provided a "direct benefit" to the ward, is the primary issue in *Lamb*. While the superior court's decision in this case is in harmony with *Lamb*, the issues are distinct. The superior court in this case found that the Hardmans' advocacy resulted in "no benefit" to the wards—not even a "collateral benefit". (Appendix B to Grounds for Direct Review, at 8.) Even if the Hardmans were successful in *Lamb*, that would not dispose of the issue of whether a guardian is entitled to fees where *no* benefit, direct *or* indirect, was shown.

The Hardmans' "Issue 2," whether attorney fees are available under RCW 11.96A.150 to a non-prevailing party who raises unique issues on appeal, is also not present in this case. The superior court denied

the Hardmans' request for additional attorney fees because the Hardmans had undertaken the litigation to establish their own right to collect fees. (Appendix B to Grounds for Direct Review, at 9.) The reasons given for the denial of attorney fees by the Court of Appeals in *Lamb*, 154 Wn. App. at 549, are not present here.

The two constitutional issues enumerated by the Hardmans as Issues #3 and #4 were unsuccessfully raised in the Court of Appeals in *Lamb*. *Lamb*, 154 Wn. App. at 548-49. However, the Hardmans did not seek review of their constitutional claims when they petitioned for review in this Court in *Lamb*. (*See* Appendix B.) In the present case, the separation of powers claim would be raised for the first time on appeal.

The Hardmans further state that this case was "decided based on *Lamb*" and "the first with a record developed with *Lamb* in mind." Grounds for Direct Review at 5. The timeline of the case shows those statements to be misleading. The memorandum decision in this case was issued on December 18, 2009, three days prior to the unpublished *Lamb* decision's release and months before the decision was published. The court did not allow any additional evidence after the *Lamb* decision was announced. The commissioner's subsequent order incorporating the memorandum decision, and the revision order affirming it, did not

incorporate *Lamb*'s reasoning in any way. While this case has similarities to *Lamb*, it is a distinct case raising distinct issues.

B. This Case Does Not Present An Urgent And Fundamental Matter Of Broad Public Import

None of the issues listed by the Hardmans—or that actually are present in this case—are of broad public import. They claim that this case involves the constitutional right to petition, though they fail to explain how that right is implicated in the superior court's decision. They are correct that the right to petition is a fundamental right, but they fail to establish that the issue they present is an urgent and important one.

The core issue in this case is that the Hardmans believe that they should be compensated for time they spend engaged in certain political advocacy activities. The superior court determined that those activities were unconnected to any actual need of their wards, and provided no benefit to them, so that the Hardmans cannot charge their wards for those activities. The court did not hold that political advocacy can never be compensated when necessary to address a ward's individual needs, but merely that there was no need for it in this case. The Hardmans fail to explain how a fundamental right is implicated here, how any fundamental right is denied if the Hardmans are not awarded compensation from their wards, or why the issue is "fundamental and urgent." Given that the

superior court determined that these wards receive no benefit from the Hardmans' advocacy, it is hard to imagine why compensation for that advocacy should be considered an urgent issue.

The Hardmans attempt to make this a case about the First Amendment rights of their wards by equating their compensation with their wards' right to petition the government. By their logic, any restriction on a guardian's ability to charge fees to his ward is transformed into a restriction on the ward's fundamental rights. But it is not the job of a guardian to use resources unnecessarily. The guardian and the court have a duty to manage the ward's finances wisely. It is no abridgment of a ward's rights for a court to preserve the ward's estate to pay only for services that are actually necessary to serve the interests of the individual ward.

Even if the Hardmans do raise an issue involving fundamental rights, the issue is not one of broad public importance. The Hardmans appear to be the only guardians who have sought compensation from their wards for engaging in broad political and community activism. The only parties with an interest in the determination of this case are DSHS, the Hardmans themselves, and the individual wards whose income is at issue.

C. This Case Does Not Require Prompt, Ultimate Determination

The activities for which the Hardmans seek compensation in this case were conducted between 2007 and 2009. The Hardmans collected their requested compensation during that period as an allowance. The practical question in this case is whether they will keep that allowance, or whether they will have to reimburse their wards for any excess funds they took. Payment for past services is not an urgent issue requiring prompt determination, and the Hardmans make no attempt to explain why that issue must be decided on direct review by this Court rather than in the normal course of review in the Court of Appeals.

A secondary issue may be whether the Hardmans should receive an allowance of $175 as the superior court ordered, or some greater amount. The Hardmans made do with an allowance of $175 for Ms. McNamara during the previous three years, and they have not claimed that they were unable to adequately fulfill their duties to her during that time. The only apparent urgency to this case is the Hardmans' desire to increase their allowance as soon as possible. If the Hardmans do find it necessary to provide extraordinary services in any of these six cases, beyond their usual and customary duties as guardians, the superior court has indicated that it will approve additional compensation at a later date. (Appendix B to Grounds for Direct Review, at 9.)

D. Direct Review Is Inappropriate For The "Associated Issue" Involving CR 59

The Hardmans make no attempt to justify direct review of what they label an "associated issue" involving CR 59. Grounds for Direct Review at 2-3. As they provide no statement of grounds, no answer is necessary. But it should be clear that the Court of Appeals is well situated to examine the procedure followed by the superior court in this case to determine whether it constituted an abuse of discretion under the civil rules.

IV. CONCLUSION

The Hardmans have not demonstrated any grounds for direct review by the Supreme Court. Accordingly, their request for direct review should be denied.

RESPECTFULLY SUBMITTED this 3rd day of November, 2010.

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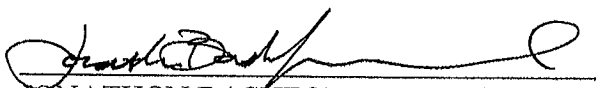

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APPENDIX

Court of Appeals of Washington, Division 1.
In the Matter of the GUARDIANSHIP OF Sandra J. LAMB, An Incompetent Person.
In the Matter of the Guardianship of Rebecca Robins, An Incapacitated Person.
Nos. 62711-2-I, 62613-2-I.

Dec. 21, 2009.
Publication Ordered Feb. 17, 2010.

Background: Certified professional co-guardians sought special advocacy fees for their political, lobbying, and community outreach activities on behalf the developmentally disabled. After fees were awarded to co-guardians, the Department of Social and Health Services (DSHS) filed motion to revise orders awarding fees. The Superior Court, King County, Steven C. Gonzalez, J., revised orders, partially denying co-guardians' request for special advocacy fees, and denied co-guardians' motions for reconsideration. Co-guardians appealed. DSHS cross-appealed.

Holdings: The Court of Appeals, Leach, J., held that:
(1) co-guardians were not entitled to guardian fees for their political, lobbying, or community outreach activities;
(2) state guardianship statutes were not preempted by Medicaid Act; and
(3) orders denying co-guardians' requests for guardianship fees for their special advocacy activities did not deprive wards of their rights to petition the government under Federal and State Constitutions.

Affirmed in part and reversed in part.

West Headnotes

[1] Mental Health 257A 158.1

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak158 Costs
257Ak158.1 k. In general. Most Cited Cases

Mental Health 257A 185

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak180 Compensation of Guardian or Committee
257Ak185 k. Proceedings and order for allowance. Most Cited Cases
A superior court's award of guardian fees and costs is reviewed for an abuse of discretion.

[2] Mental Health 257A 180.1

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak180 Compensation of Guardian or Committee
257Ak180.1 k. In general. Most Cited Cases
Co-guardians' political, lobbying and community outreach activities on behalf of the developmentally disabled did not directly benefit wards, and, thus, co-guardians were not entitled to guardian fees for these activities; while co-guardians argued that direct benefit received by wards for their advocacy activities was the prevention of wards' removal from residential habilitation center, co-guardians' advocacy activities did not provide this benefit since none of the perceived threats to center would necessarily have led to its closure and forced wards to relocate, and co-guardians failed to present any expert evidence in support of their opinion that maintaining wards at center would be in wards' best interests. West's RCWA 11.92.180.

[3] Mental Health 257A 185

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak180 Compensation of Guardian or Committee
257Ak185 k. Proceedings and order for allowance. Most Cited Cases

Trial court's order awarding guardian fees to co-guardians for their community outreach activities was not supported by sufficient findings, as order provided neither the court's rationale for differentiating between co-guardians' political activities, for which the court declined to award guardian fees, and co-guardians' community outreach activities, nor did the court provide a factual basis for determining amount of allowance for community outreach activities. West's RCWA 11.92.180.

[4] Mental Health 257A ⚿180.1

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak180 Compensation of Guardian or Committee
257Ak180.1 k. In general. Most Cited Cases
A court may not award fees to a guardian simply on the basis of work performed; rather, the court must determine the need for the work done and whether it benefited the guardianship. West's RCWA 11.92.180.

[5] Asylums and Assisted Living Facilities 43 ⚿12

43 Asylums and Assisted Living Facilities
43k12 k. Preemption. Most Cited Cases

Health 198H ⚿492

198H Health
198HIII Government Assistance
198HIII(B) Medical Assistance in General; Medicaid
198Hk490 Recovery Back or Recoupment of Payments
198Hk492 k. Liens in general. Most Cited Cases

States 360 ⚿18.79

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.79 k. Social security and public welfare. Most Cited Cases
State guardianship statutes, which required residents of residential habilitation centers to apply their social security benefits towards their cost of care, did not conflict with anti-lien provisions of Medicaid Act, and, thus, were not preempted by the Act, as under both federal and state regulations, residents were required to apply their income, minus certain allowances, to the cost of their care. Social Security Act, § 1917(a)(1), (b)(1), 42 U.S.C.A. § 1396p(a)(1), (b)(1); 42 C.F.R. §§ 435.725, 435.733, 435.832, 436.832.

[6] States 360 ⚿18.5

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.5 k. Conflicting or conforming laws or regulations. Most Cited Cases
Where Congress has not expressly preempted or entirely displaced state regulation in a specific field, state law is preempted to the extent that it actually conflicts with federal law.

[7] States 360 ⚿18.5

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.5 k. Conflicting or conforming laws or regulations. Most Cited Cases
A conflict between state and federal law arises, for purposes of preemption analysis, where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

[8] Constitutional Law 92 ⚿1460

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1460 k. In general. Most Cited Cases

Constitutional Law 92 ⚿1481

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1481 k. Lobbying. Most Cited Cases

Mental Health 257A ⚿180.1

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak180 Compensation of Guardian or Committee
257Ak180.1 k. In general. Most Cited Cases
Trial court's orders denying co-guardians' requests for guardianship fees for their political and lobbying activities did not deprive wards, who were incapacitated persons (IP), of their rights to petition the government under Federal and State Constitutions, as co-guardians failed to establish that they could exercise political rights of an IP, such as the right to petition, in the IP's best interests when the IP cannot express his preferences. U.S.C.A. Const.Amend. 1.
**33 Michael L. Johnson, Hardman & Johnson, Seattle, WA, for Appellant.

Jonathon Bashford, Office of the Attorney General, Olympia, WA, for Respondents.

Emily Rebecca Cooper Pura, Disability Rights Washington, Seattle, WA, for Amicus Curiae on behalf of Disability Rights Washington.

Nancy Lynn Talner, Attorney at Law, Sarah A. Dunne, ACLU, Seattle, WA, Laura Jean Beveridge, Attorney at Law, Cambridge, MA, for Amicus Curiae on behalf of American Civil Liberties Union of Washington.

LEACH, J.

*539 ¶ 1 The decision to award guardian fees lies within the discretion of the superior court. But the court may only award fees for work performed by the guardian that directly benefits the ward. In this appeal, we are asked to decide whether James and Alice Hardman, the co-guardians of Sandra Lamb and Rebecca Robins, may be compensated for engaging in the specific advocacy activities listed in their advocacy report. Because the Hardmans fail to establish that these activities provide a direct benefit to their wards, we hold that they are not entitled to compensation under the facts of this case.

FACTS

¶ 2 James Hardman and his mother, Alice Hardman, are certified professional guardians.[FN1] Approximately 23 of their wards are clients of the Department of Social and Health Services (DSHS) residing at Fircrest School. Fircrest is one of five residential habilitation centers (RHCs) established by state law to serve people with developmental disabilities. Among the Hardmans' wards residing at Fircrest are Sandra Lamb and Rebecca Robins.

> FN1. RCW 11.88.008 defines a "professional guardian" as "a guardian appointed under this chapter who is not a member of the incapacitated person's family and who charges fees for carrying out the duties of court-appointed guardian of three or more incapacitated persons."

A. Sandra Lamb

¶ 3 Lamb is a 53-year-old woman with a medical diagnosis of "profound mental retardation" resulting from a meningitis infection she suffered sometime before age three. With communication skills level comparable to a two-and-a-half- to three-year-old, Lamb has multiple disabilities, including limited speech and articulation, seizure disorder, mild microcephaly, hearing loss, and hemiplegia. She receives a monthly income of $1,106 in Social Security Administration benefits and is the beneficiary of a special needs trust established in 2008.

*540 ¶ 4 Lamb has resided at Fircrest since 1964. In 1982, she was placed in a community group home but was returned to Fircrest due to her "fits of anger and anti-social behavior."**34 In 1986, the King County Superior Court declared Lamb an incapacitated person (IP). Dr. Lee Miller, a staff physician at Fircrest, recommended against community placement in favor of a structured environment. In 1993, Ms. Hardman was appointed as the guardian of the person and estate of Lamb. The order states that Lamb "shall not retain her right to vote." Mr. Hardman was appointed co-guardian in 1997. In 2004, Lamb and four other of the Hardmans' wards were relocated to Rainier RHC in Buckley, Washington. The Hardmans filed an action under the abuse of vulnerable adults statute, chapter 74.34 RCW, in King County Superior Court in 2006 and requested Lamb's return to Fircrest. In 2007, Lamb was returned to Fircrest,[FN2] and the Hardmans obtained a financial settlement for her the next year.

FN2. In the advocacy report, the Hardmans claim that "Lamb's suffering appeared to cease the moment she returned. The transformation in her mood was stunning. She has been extraordinarily happy since returning to Fircrest."

¶ 5 On May 2, 2008, the Hardmans filed a triennial guardian's report for Lamb. In their report, the Hardmans requested approval of their guardian fees for the prior reporting period. They also sought an allowance for the new three-year period of $225 per month for guardian fees for routine services and $150 per month for "special advocacy fees." In support of their request for special advocacy fees, the Hardmans attached a 16-page document, titled "Advocacy Report of James R. Hardman," listing various advocacy activities undertaken from January 2004 until February 2008.[FN3] The report states that during this period the Hardmans worked with advocacy groups such as Friends of Fircrest, the Fircrest Human Rights Committee, and Action for RHCs to lobby state and local officials. Mr. Hardman also worked "within the Washington State Disabilities *541 Issues caucuses ... [and] the State Democratic convention as a delegate to advocate for the resolution of support for Fircrest and other State RHCs." In June 2008, the Hardmans traveled to Washington D.C. to attend the annual Voice of the Retarded conference and lobby "every State of Washington Congressional office." In addition to lobbying officials, the Hardmans opposed legislation proposed in 2007 that would have created a commission with authority to close RHCs and championed legislative initiatives, including:

FN3. The report also extensively discusses the Hardmans' litigation efforts. The Hardmans are not seeking compensation for the time spent on litigation in this case.

bills which would extend to RHC residents the rights ... contained in RCW 70.129; incentives for Washington colleges to include courses concerning the treatment of people with developmental disabilities [DD]; background checks for all who care for people with DD; funding for RHCs; and, whistleblower protection for professionals who treat people [i]n RHCs.

The report further describes the Hardmans' efforts to prevent certain types of development around the Fircrest area by attending land use meetings. Finally, the report describes the informational and public relations materials produced by the Hardmans, including a monthly newsletter and a PowerPoint presentation about the challenges facing Fircrest residents. Though the report states that "[t]hese efforts are not easily segregated from one another," it justifies the Hardmans' request for a monthly allowance of $150 for each ward by taking the total time spent on advocacy, approximately 80 hours, divided by the total number of the Hardmans' wards at Fircrest, and multiplying that number by Mr. Hardmans' hourly rate.

¶ 6 DSHS filed an objection to the Hardman's request for the proposed fees on June 2, 2008. The Hardmans filed a response, a supplement to Lamb's report, and declarations regarding fees for routine services and for "ongoing special advocacy activities." In the declarations, the Hardmans increased their request for routine services to $235 per month and explained that the advocacy fees were justified because

*542 [m]oving medical and/or behaviorally fragile people is potentially hazardous to their health and well-being. Closing RHCs would necessitate such moves. My clients are medically and/or behaviorally fragile. Remaining where they are successful**35 and in a medical facility where their great needs are met is essential. This has required great and determined effort, fostering allies, and using groups.

The Hardmans reiterated themes stated in their advocacy report-namely, that their advocacy efforts were necessary to combat the political threat posed by key DSHS officials, disability rights organizations, and real estate developers that favored closing Fircrest.

B. Rebecca Robins

¶ 7 Rebecca Robins is a 53-year-old woman suffering from "profound or severe mental retardation" since birth. Functioning at a level comparable to that of an 18-month-old, Robins has no speech abilities and has been diagnosed with autism, scoliosis, self-injurious behavior and aggression. She receives a monthly income of $892 from a railroad retirement account.

¶ 8 Robins has resided in Fircrest since 1984. In 1985, the King County Superior Court deemed Robins an IP. Due to her "tantrum like behavior with repeated spit-

ting and kicking," Dr. Miller recommended against community placement, reasoning that her behavior "would likely make it extremely difficult or almost impossible for her to be [in] a community group home setting." Ms. Hardman was appointed guardian of the person and estate of Robins in 1993, and Mr. Hardman was appointed co-guardian in 1998.

¶ 9 On May 9, 2008, the Hardmans filed a biennial guardian report for Robins, seeking approval of their guardian fees for the prior reporting period and an allowance for the new three-year period of $235 per month for guardian fees for routine services and $150 per month for "special advocacy fees." In support of their request for "special advocacy fees," the Hardmans attached the same advocacy report that they had submitted for Lamb.

*543 C. Joint Hearing and Appeal

¶ 10 On June 6, 2008, at a joint hearing for Lamb and Robins, the commissioner approved both reports and awarded an allowance of $175 per month for guardian fees for routine services and $150 per month for special advocacy activities. The commissioner found that Mr. Hardman's declaration regarding ongoing advocacy activities sufficiently stated the "causal connection between the advocacy work that's being done and the individual benefit that's being conferred." The commissioner required the Hardmans to "submit a report specifically reporting the time spent on advocacy and specifically relating the benefit conferred by that advocacy" on Lamb and Robins at the next accounting.

¶ 11 On June 16, 2008, DSHS filed a motion to revise the commissioner's orders. The Hardmans filed a response. Hearings were held in King County Superior Court on August 28 and September 5, 2008. In revising the orders and partially denying the Hardman's request for advocacy fees, the superior court differentiated between the advocacy activities described in the report:

> a. The political and lobbying activities undertaken by Guardians are outside the scope of their guardianship of Ms. Lamb. The Guardians' request for extraordinary fees for the next reporting period are denied to the extent that those fees relate to political and lobbying activities.
>
> b. Community outreach activities that are necessary to protect the best interests of Ms. Lamb are within the scope of the guardianship. Therefore, the Motion to Revise is denied and the Guardians' extraordinary fees claimed for the next reporting period are allowed to the extent that those fees relate to community outreach that is necessary to protect the best interests of Ms. Lamb. The court finds that the fees for those activities currently amount to between $50 and $75 per month.

The Hardmans filed motions for reconsideration, which the court denied without explanation.

*544 ¶ 12 The Hardmans appealed the superior court's orders regarding their requests for special advocacy fees for Lamb and Robins, as well as the orders denying their motions for reconsideration. The appeals were consolidated by this court. DSHS cross-appealed the portions of the orders awarding an allowance for the Hardmans' community outreach activities.[FN4]

> FN4. The American Civil Liberties Union of Washington filed an amicus brief in support of the Hardmans. Disability Rights Washington filed an amicus brief in support of DSHS.

**36 STANDARD OF REVIEW

[1] ¶ 13 A superior court's award of guardian fees and costs is reviewed for an abuse of discretion.[FN5] An abuse of discretion occurs when the court's decision is manifestly unreasonable or based on untenable grounds.[FN6] The court necessarily abuses its discretion when its decision is based on an erroneous view of the law or involves application of an incorrect legal analysis.[FN7] But if pure questions of law are presented, a de novo standard of review should be applied to those questions.[FN8] Issues of statutory construction are also reviewed de novo.[FN9]

> FN5. *In re Guardianship of Spiecker*, 69 Wash.2d 32, 34-35, 416 P.2d 465 (1966) (citing *In re Estate of Leslie*, 137 Wash. 20, 241 P. 301 (1925)).
>
> FN6. *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971) (citing

MacKay v. MacKay, 55 Wash.2d 344, 347 P.2d 1062 (1959)).

FN7. *Dix v. ICT Group, Inc.*, 160 Wash.2d 826, 833, 161 P.3d 1016 (2007).

FN8. *See Ang v. Martin*, 154 Wash.2d 477, 481, 114 P.3d 637 (2005).

FN9. *Wash. Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.*, 137 Wash.App. 592, 598, 154 P.3d 287 (2007) (stating that agency rules are reviewed de novo as if they were statutes, but that the court gives "substantial weight to an agency's interpretation of statutes and regulations within its area of expertise").

ANALYSIS

A. Compensation for the Hardmans' Advocacy Activities

[2][3] ¶ 14 The Hardmans contend that they are entitled to compensation for their advocacy activities as the personal *545 guardians of Lamb and Robins.[FN10] According to the Hardmans, the framework governing guardian compensation and expenses requires "some nexus between the guardians' activities and the best interests of [the wards]," but "no actual benefit must be shown." DSHS responds that a direct benefit to the ward must be shown for the court to award fees.

FN10. Under RCW 11.92.043(4), a guardian of a ward's person is a charged with the duty "to care for and maintain the incapacitated person in the setting least restrictive to the incapacitated person's freedom and appropriate to the incapacitated person's personal care needs, [and to] assert the incapacitated person's rights and best interests."

[4] ¶ 15 In Washington, a guardian is entitled to "such compensation for his or her services ... as the court shall deem just and reasonable." [FN11] The court may also award "[a]dditional compensation ... for other administrative costs, including services of an attorney." [FN12] "But [a] court may not award fees simply on the basis of work performed. Rather, the court must determine the need for the work done and whether it benefited the guardianship." [FN13]

FN11. RCW 11.92.180.

FN12. RCW 11.92.180.

FN13. *In re Guardianship of McKean*, 136 Wash.App. 906, 918, 151 P.3d 223 (2007) (citation omitted).

¶ 16 *In re Guardianship of McKean*[FN14] demonstrates this required showing of a direct benefit. In that case, the trial court appointed guardians to protect two minor daughters' assets in relation to their father's dissolution proceedings.[FN15] The court later authorized payments of the guardians' fees and costs, as well as attorney fees, from the daughters' guardianship assets.[FN16] On appeal, the father argued that the court abused its discretion in ordering the award of fees.[FN17] In upholding the award, Division Two emphasized that the guardian had shown a direct benefit to the guardianship.*546 Specifically, the work performed by the guardian had brought to light the daughters' assets and **37 interests, a task that had eluded two previous guardians ad litem and the judge in the dissolution proceedings.[FN18]

FN14. 136 Wash.App. 906, 151 P.3d 223 (2007).

FN15. *McKean*, 136 Wash.App. at 909-11, 151 P.3d 223.

FN16. *McKean*, 136 Wash.App. at 917-18, 151 P.3d 223.

FN17. *McKean*, 136 Wash.App. at 917-18, 151 P.3d 223.

FN18. *McKean*, 136 Wash.App. at 919, 151 P.3d 223.

¶ 17 In this case, the Hardmans have not shown that their advocacy activities directly benefit Lamb and Robins. Essentially, the Hardmans claim that the direct benefit derived from their advocacy activities is the prevention of their wards' removal from Fircrest. But the Hardmans' advocacy activities do not provide this benefit since none of the perceived threats to Fircrest, as described in the reports, would have nec-

essarily led to its closure and forced Lamb and Robins to relocate. Nor have the Hardmans presented any expert evidence in support of their opinion that maintaining Lamb and Robins at Fircrest would be in their best interests.[FN19] Their reports only discuss the potential benefit conferred upon a class of IPs under the Hardmans' care. Accordingly, we affirm the superior court's decision denying an allowance for the Hardmans' political and lobbying activities, but on grounds that the Hardmans have not sufficiently shown that these activities directly benefit Lamb and Robins.

FN19. Because the Hardmans fail to establish that their advocacy activities directly benefit Lamb and Robins, we need not address whether these activities qualify as "extraordinary services" under WAC 388-79-050.

¶ 18 On DSHS's cross-appeal, we reverse the court's award of a monthly allowance of $75 for the Hardmans' community outreach activities on the same grounds. Even if the Hardmans had demonstrated a direct benefit from their community outreach activities, the court's order contains insufficient findings supporting the amount of the award to permit appellate review.[FN20] The order provides neither the court's rationale for differentiating between political and community outreach activities nor the factual basis for determining the amount of the allowance for community outreach activities.

FN20. *Estrada v. McNulty,* 98 Wash.App. 717, 723-24, 988 P.2d 492 (1999).

*547 ¶ 19 The Hardmans assert several alternative grounds in support of their requests for advocacy fees. None of these has merit.

[5] ¶ 20 First, the Hardmans raise a preemption argument, claiming that the state guardianship statutes conflict with certain provisions of the Medicaid Act-namely, 42 U.S.C. § 1396p(a)(1) and (b)(1).[FN21] Because these provisions generally prohibit DSHS from imposing liens and seeking adjustments or recoveries from an individual's property and because the exceptions to these statutes do not apply here, the Hardmans assert that "state statutes and regulations imposing financial liability are inoperative to the extent they are inconsistent."[FN22]

FN21. The anti-lien provision contained in § 1396p(a)(1) provides that "[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan" and lists two exceptions that do not apply here. The anti-recovery provision contained in § 1396p(b)(1) provides that "[n]o adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except [under circumstances that are not pertinent to this case]."

FN22. The Hardmans explain that "imposing financial liability" means "the extent a Medicaid recipient ... is required to apply his or her social security benefit to pay towards his cost of care." The Hardmans later inconsistently argue that "federal law permits, but does not impose, financial liability on Medicaid recipients."

[6][7] ¶ 21 "Where Congress has not expressly preempted or entirely displaced state regulation in a specific field, as with the Medicaid Act, 'state law is preempted to the extent that it actually conflicts with federal law.' "[FN23] A conflict between state and federal law arises where the state law " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' ".[FN24]

FN23. *Lankford v. Sherman,* 451 F.3d 496, 510 (8th Cir.2006) (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 203-04, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983)).

FN24. *Lankford,* 451 F.3d at 510 (quoting *Pac. Gas & Elec. Co.,* 461 U.S. at 204, 103 S.Ct. 1713); *see also Hankins v. Finnel,* 964 F.2d 853, 861 (8th Cir.1992).

**38 ¶ 22 Contrary to the Hardmans' position, no conflict exists between state statutes "imposing financial liability" and the Medicaid Act because federal regulations implementing*548 the Act require that "an agency must reduce its payment to an institution, for services provided to an individual," by the amount of the individual's income that remains after

certain deductions have been made, such as a personal needs allowance.[FN25] These regulations apply to state agencies and prohibit them from paying any amounts that are the responsibility of the patient.[FN26] Thus, under both federal and state regulations, RHC residents are required to apply their income, minus certain allowances, to the cost of their care. There is no conflict preemption.

FN25. *See* 42 C.F.R. §§ 435.725, 435.733, 435.832, and 436.832.

FN26. *See Florence Nightingale Nursing Home v. Perales*, 782 F.2d 26, 29 (2d Cir.1986) (stating that 42 C.F.R. §§ 435.725 and 435.832 "are consistent with the statutory plan that Medicaid funds not be paid to reimburse those costs that patients with resources of their own can afford").

¶ 23 The Hardmans next argue that state guardianship statutes abridge the superior court's powers to award guardian fees, citing *Blanchard v. Golden Age Brewing Co.*[FN27] There, the legislature enacted a law barring courts from issuing injunctions in labor disputes except under limited circumstances. Noting that "[t]he writ of injunction is the principal, and the most important, process issued by courts of equity, it being frequently spoken of as the 'strong arm of equity,' "[FN28] our Supreme Court held that the statute was unconstitutional because "[t]he legislature cannot indirectly control the action of the court by directing what steps must be taken in the progress of a judicial inquiry, for that is a judicial function." [FN29] Because a state court's authority to award guardian fees from the income of Medicare beneficiaries is not comparable to the court's equitable power to issue injunctions, *Blanchard* is inapposite.

FN27. 188 Wash. 396, 63 P.2d 397 (1936).

FN28. *Blanchard*, 188 Wash. at 415, 63 P.2d 397.

FN29. *Blanchard*, 188 Wash. at 418, 63 P.2d 397.

[8] ¶ 24 Finally, the Hardmans and amicus ACLU argue that the superior court's orders deprive Lamb and Robins of their rights to petition the government under the state and federal constitutions.*549 But they fail to cite any relevant case law establishing that a guardian may exercise political rights of an IP, such as the right to petition, in the IP's best interests when the IP cannot express his or her preferences. Instead, the cases they cite primarily involve the right to refuse life-sustaining treatment.[FN30]

FN30. *In re Guardianship of Ingram*, 102 Wash.2d 827, 829, 689 P.2d 1363 (1984) (reversing a trial court order imposing surgery to treat malignant cancer of the larynx when the IP expressed a preference for radiation treatment); *In re Welfare of Colyer*, 99 Wash.2d 114, 123, 660 P.2d 738 (1983) (holding there were "no compelling state interests opposing the removal of life sustaining mechanisms from [a patient in a chronic vegetative state] that outweighed her right to refuse such treatment"); *In re Guardianship of Hamlin*, 102 Wash.2d 810, 815, 689 P.2d 1372 (1984) (concluding that cardiopulmonary resuscitation could be withheld from irreversibly comatose patient).

B. Attorney Fees

¶ 25 The Hardmans request an award of attorney fees on appeal under RAP 18.1 and RCW 11.96A.150.[FN31] Because they have not prevailed on appeal, we decline their request. Given the unique issues in this case, we also deny the Hardmans' request for fees below.[FN32]

FN31. The commissioner approved $10,000 for litigation expenses associated with the appeal.

FN32. *In re Estate of D'Agosto*, 134 Wash.App. 390, 402, 139 P.3d 1125 (2006) (noting case law in which attorney fees were denied where difficult or novel issues were presented).

CONCLUSION

¶ 26 The Hardmans fail to establish that the advocacy activities listed in their report provide a direct benefit to their wards. We therefore affirm the superior court's decision denying an allowance for the Hardmans' political and lobbying activities, though on different

grounds,[FN33] and reverse its decision **39 awarding a monthly allowance of $75 for community outreach activities.

FN33. *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wash.2d 868, 876, 154 P.3d 891 (2007).

¶ 27 WE CONCUR: LAU and ELLINGTON, JJ.

Wash.App. Div. 1,2009.
In re Guardianship of Lamb
154 Wash.App. 536, 228 P.3d 32

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Supreme Court No. _____

Court of Appeals No. 62711-2-I
(Consolidated Number)

SUPREME COURT OF
OF THE STATE OF WASHINGTON

In the Matter of the
GUARDIANSHIP OF SANDRA LAMB

James R. Hardman and Alice L. Hardman, Guardians
Petitioners

v.

State of Washington
Department of Social & Health Services

Respondent.

PETITION FOR REVIEW

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WSBA #28172
March 18, 2010

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I. IDENTITY OF PETITIONER.

The Petitioners are court-appointed certified professional guardians (CPGs) of the person and estate of Sandra Lamb and Rebecca Robins. They are nominal parties representing the rights and interests of Sandy and Rebecca, whose respective estates and persons are before the Court.

In the Court of Appeals, the Petitioners were the Appellants and Cross-Respondents.

II. CITATION TO COURT OF APPEALS DECISION.

Guardianship of Sandra Lamb, James R. Hardman and Alice L. Hardman, Guardians, Appellants and Cross-Respondents, v. State of Washington Department of Social and Health Services, No. 62711-2-I, filed 12/21/2009 (Appendix A) (Opinion).[1] The Court of Appeals decision is published at ___ Wn.App. ___, 169 P.3d 847 (2010).

III. ISSUES PRESENTED FOR REVIEW.

Many issues were raised in the courts below. However, the Guardians seek review of the following narrow questions of law concerning the application of rules of compensation by a guardianship court which were wrongly decided by the Court of Appeals.

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[1] The case was consolidated with *Guardianship of Rebecca Robins, James R. Hardman and Alice L. Hardman, Guardians, Appellants and Cross-Respondents, v. State of Washington Department of Social and Health Services*, No. 62613-2-I.

(1) May courts apply a rule of guardian compensation requiring a "direct" benefit to the person to the exclusion of all other rules of compensation, and if so, under what circumstances?

(2) May courts apply a rule of attorney compensation precluding compensation because of "unique issues", or because a party is not the prevailing party, to the exclusion of RCW 11.96A.150, and if so, under what circumstances?

IV. STATEMENT OF THE CASE.

The Guardians represent the rights and interests of Sandra Lamb and Rebecca Robins. They are persons with profound or severe developmental disability and within that category constitute a miniscule percentage (1-3%) of those developmentally disabled who are intellectually disabled.[2] They are developmentally two year olds in adult bodies. They are residents of Fircrest School in Shoreline, Washington.

Guardians are decision-makers and advocates, not caregivers. Pursuant to federal and state law pertaining to facilities such as Fircrest School, the Guardians advocate for Sandy's and Rebecca's interests (a) at the RHC level concerning day to day care, informed consent, development and monitoring of the individual plan of care, and behavioral issues, on an

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[2] Intellectually disabled is the preferred term for mental retardation. The latter term is used as legal term in federal statutes and regulations.

individualized basis, as well as (2) outside the RHC level and on the basis of shared characteristics, predominantly the following areas: educating the Legislature about the care needs and characteristics of Sandy and Rebecca, the potential death or injury, or the potential loss and diminishment of effective services, that might occur if their placement is changed for non-therapeutic reasons; by corresponding or meeting with executive branch officials; by attending community meetings for the developmentally disabled; by engaging in the land use decision-making process of the City of Shoreline and the Department of Social and Health Services relative to development of the Fircrest campus; and, by participation with a Department of Health land use decision-making process regarding the enhancement of the public health lab on the Fircrest campus and the storage of radioactive materials and biological samples there. The focus of advocacy efforts frequently shift because of proposed legislation, executive action, municipal activity, or community planning.

The Department of Social and Health Services (DSHS) opposes the Guardians' exercise of these advocacy efforts and the content of the advocacy. They challenge the compensation of the Guardians as well as compensation of their attorney. At the heart of the issue are the civil rights of Sandy and Rebecca, and the Guardians advocated on behalf of Sandy's and Rebecca's best interests. DSHS sees the case as a

compensation issue, denies Guardians may exercise rights of incapacitated persons, minimizes the advocacy as "politicking", and enhances the State's own financial position by putting into the General Fund what the guardian and the attorney for the guardian does not receive as fair compensation.

In addition to contesting the content of the advocacy, DSHS raised many novel issues in its opposition to compensation. The Guardians were forced to respond to the litigation, including extensive research and review of complex Medicaid rules.

The advocacy and the myriad issues raised in the courts below are not presented for review here. The Court of Appeals did not squarely address the advocacy issues and decided the compensation issues on alternative grounds without additional briefing: the record did not show they had conferred a "direct benefit" to Sandy and Rebecca, Opinion, at 1 ("under the facts of this case"), and the Guardians' attorney was precluded from compensation because of the "unique issues" in the case before the trial court and because they did not prevail in the Court of Appeals, Opinion, at 15.

Accordingly, rules of compensation and how they should be applied in guardianship cases statewide are the only issues presented for review here.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED.

The Court of Appeals decision is in conflict with decisions of the Supreme Court. RAP 13.4(b)(1).

It has long been the rule in Washington that a guardian should receive compensation for its services based on the value of services performed, absent significant wrongdoing. *In Re Montgomery's Estate*, 140 Wash. 51, 53, 248 P. 64 (1926). See also *In Re Leslie's Estate*, 137 Wash. 20, 23, 241 P. 301 (1925) ("fair and reasonable compensation" of attorneys); *In the Matter of the Guardianship of Raymond A. Spiecker*, 69 Wn.2d 32, 34-35, 416 P.2d 465 (1966) (guardian and attorney compensation largely within discretion of the trial court).

However, the Court of Appeals juxtaposed the rule and stated the Guardians are not entitled to compensation absent a "direct" benefit. Opinion, at 10 ("The Hardmans have not shown that their advocacy activities directly benefit Lamb and Robins"). This abrogation of the Supreme Court's general rule of compensation should be reviewed as a matter of substantial public interest.

The Court of Appeals decision involves issues of "substantial public interest" that this Court should review. RAP 13.4(b)(4).

A decision involves an issue of substantial public interest if (1) the issue is of a public nature, (2) an authoritative determination is desirable to provide future guidance to public officers, and (3) the issue is likely to

recur. *Philadelphia II v. Gregoire*, 127 Wn.2d 707, 712, 911 P.2d 389 (1996).

The Public Nature of the Case. The Guardians in this case are certified professional guardians. Certified professional guardians serve incapacitated persons throughout the State and are regulated by the Certified Professional Guardianship Board (CPG Board) created by the Supreme Court. General principles of compensation for their decision-making and advocacy and that of their attorneys -- applied in the superior courts -- are therefore public in nature.

Guidance to the Courts and Officers of the Court. Future guidance to the superior courts and to certified professional guardians as officers of the courts is necessary. The general principle of compensation enunciated by the Supreme Court should be retained, and applied to guardians and their attorneys, mediated by a requirement that the compensation be just and reasonable.

The "direct" benefit rule should be abolished. All compensation fits within the general principle just described. The rule invites litigation because it is both overly broad and overly narrow. The rule goes in the wrong direction because the trend is to impose more and more statutory and regulatory duties on CPGs and thus demand a more intensive use of resources by their attorneys. The rule appears to preclude compensation

when applied to compliance with guardian duties or CPG Board Standards of Practice which -- despite best efforts -- might fail to achieve a tangible or measurable benefit.

There is case authority on a "benefit". There is also case authority on a "direct" benefit to an incapacitated person's estate. Counsel did not, however, find any authority concerning a "direct" benefit to the incapacitated person's *person*.[3]

The Court of Appeals declared a "direct" benefit must be conferred and found the trial court record did not support that standard. However, it did not explain why the rule is appropriate with respect to the person (as opposed to estate)[4] or how the rule is to be applied to a person. A direct benefit may imply a nexus or causation. Or it may be confused with a rule of exclusive or incidental benefit. It certainly cannot mean an "actual" or "substantial" benefit when applied to the person. Guardians and courts

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[3] *Estate of Niehenke*, 117 Wn.2d. 631, 818 P.2d 1324 (1991) (probate estate; estate assets; attorney fees); *Estate of Morris*, 89 Wn.App. 431, 919 P.2d 401 (1998) (probate estate; management of estate assets; attorney fees); *Allard v. Pacific National Bank*, 99 Wn.2d 394, 663P.2d 104 (1983) (trust; loss of market value; attorney fees); *Guardianship of Hallauer*, 44 Wn.App. 795, 723 P.2d 1161 (1986) (guardianship; recovery of money or property; attorney fees); *In re Guardianship of McKean*, 136 Wn.App. 906, 151 P.3d 223 (2007) (guardianship; recovery of money or property; guardian fees).

[4] At the time of the filing of the opinion in the Court of Appeals in this case, a Commissioner in the Ex parte Department apparently interpreted "direct" benefit to mean "substantial" benefit in 6 other guardianship cases. Those cases are now pending on Motions to Revise and involve the same Guardians and residents of Fircrest School with similar characteristics.

need to know how the direct benefit rule would be applied, even though it should be abolished.

Similarly, there is confusion about the rules of attorney compensation both in the trial court and on appeal which need clarification. The Court of Appeals decided that "unique issues" before the trial court are a basis for denying attorney compensation. Opinion, at 15 (citing *Estate of D'Agosto*, 134 Wn.App. 390, 402, 139 P.2d. 1125 (2006)). Opinion, at 15. However, the "unique issue" exclusion for attorney compensation simply does not fit in a guardianship case.

Guardianship cases sound in equity and are governed by equitable principles analyzed on the specific facts presented in each case. See *Vasquez v. Hawthorne*, 145 Wn.2d 103, 107-08, 33 P.2d 735 (2001). Every guardianship case is unique. The relative disability and corresponding powers of the guardian, the care needs, the parties, the family members, the assets, the income and expenses, and the public benefits are each different in any given case. Since each guardianship case inherently presents unique issues, it is wrong to apply this rule of compensation.

The Court of Appeals also failed to grasp the fact that DSHS initiated the litigation and raised the complex and unique issues in this case. Any meaningful ability for the incapacitated person's interests to be

promoted or protected or defended is automatically diminished or eliminated by the possible application of this rule.

The Court of Appeals also imposed a prevailing party requirement for attorney compensation on appeal. Opinion, at 15. However, RCW 11.96A.150 is controlling at the trial and appellate court levels. The statute does not require that a party prevail. The statute does not require that compensation be denied if "unique issues" are presented. The statute specifically says that whether litigation benefits the estate is not dispositive.[5]

The application of the "direct" benefit rules for guardian compensation, the "unique issues" exclusion for attorney compensation in the trial court, and the prevailing party rule for attorney compensation on appeal are unjust. First, the application of these rules create disincentives for guardians or their attorneys to promote, maintain, or even defend the rights and interests of our most vulnerable adults, leaving them totally to the whim of DSHS or others until a harm actually occurs. (Appendix B)

Second, these disincentives occur in a regulatory context where CPGs provide more extensive services pursuant to ever-increasing

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[5] An amendment to the statute limits the holding of case law so that a benefit to an estate need not be proven, though it may be a factor, in attorney compensation. See, e.g., *Estate of Larsen*, 103 Wn.2d 517, 694 P.2d 1051 (1985) (probate estate; estate; attorney fees; objectors' fees).

enforcement of statutory duties and ever-more demanding Standards of Practice promulgated by the CPG Board. It is unjust to create disincentives to compensation while at the same time increasing the standards of performance required to protect and defend the rights and interests of incapacitated persons, especially when it may be impossible to show a tangible, successful benefit arising from the prevention of harm or death.

Third, and finally, Guardians do not bear attorney fees and costs for the incapacitated person in their individual capacity, nor should they. The general rule is that an incapacitated person bears their own attorney fees and costs from their estate. The application of these rules in this case precludes recovery of attorney compensation from DSHS which could reimburse Sandy's or Rebecca's estate for the costs of defending against DSHS' litigation. The application of RCW 11.96A.150 provides a basis for that reimbursement from DSHS.

Recurrence of Issues. Compensation issues recur in guardianship cases with each request. CPGs and their attorneys apply for compensation throughout the State during the different stages of proceedings in a guardianship case on a regular basis, and is likely a daily occurrence.

VI. CONCLUSION AND RELIEF SOUGHT.

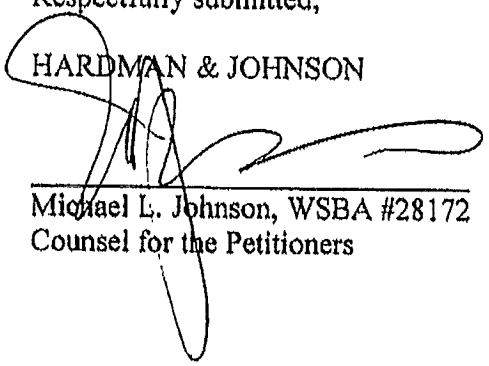
Division One juxtaposed its own rule in conflict with Supreme

Court precedent. Substantial public issues are at stake. This Court should accept review under RAP 13.4(b)(1) and (4), reverse the Court of Appeals, and take any other action as the merits of the case and the interest of justice may require.

March 18, 2010

Respectfully submitted,

HARDMAN & JOHNSON



Michael L. Johnson, WSBA #28172
Counsel for the Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this day, I caused a copy of the foregoing Petition for Review to be served on Jonathon Bashford, counsel for the State of Washington, by electronic attachment by e-mail, and by depositing the same in first class mail, postage prepaid addressed to P.O. Box 40124, Olympia, WA 98504-0124.

March 18, 2010

Michael L. Johnson, WSBA #28172

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